anc.law.ecf@alaska.gov

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

SCOTT A. KOHLHAAS, THE ALASKAN INDEPENDENCE PARTY, ROBERT M. BIRD, and KENNETH P. JACOBUS, Plaintiffs, v. STATE OF ALASKA; STATE OF ALASKA DIVISION OF ELECTIONS; LIEUTENANT GOVERNOR KEVIN MEYER, in his official capacity as Supervisor of Elections; and GAIL FENUMIAI, in her official capacity of Director of the Division of Elections, Defendants, ALASKANS FOR BETTER ELECTIONS, INC., Intervenor.	Case No. 3AN-20-09532 CI

STATE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. Introduction

In the 2020 general election, Alaska voters approved Ballot Measure 2, an initiative implementing sweeping reform of Alaska's election laws.[1] In early December

[1] *See* Exhibit A. The sponsors dubbed the initiative "the Better Elections Initiative" and it was designated 19AKBE by the Division of Elections. For simplicity, the State will refer to the initiative as Ballot Measure 2 in this memorandum, even though its provisions have since become law.

ATTORNEY GENERAL, STATE OF ALASKA
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907) 269-5100

2020, three individuals—Scott Kohlhaas, Robert Bird, and Kenneth Jacobus—and the Alaska Independence Party (collectively, "Kohlhaas") sued the State of Alaska, the Alaska Division of Elections, the Lieutenant Governor and the Director of Elections (collectively, "the State") alleging that certain provisions of Ballot Measure 2—specifically the introduction of an open, nonpartisan primary and ranked-choice voting for the general election—violated their state and federal constitutional rights and failed to comply with Article III, sections 3 and 8 of the Alaska Constitution. Because no elections have yet been held under the terms of Ballot Measure 2, this is a facial constitutional challenge appropriate for summary judgment.

The State now moves for summary judgment on all claims. Ballot Measure 2 does nothing whatsoever to impact many of the constitutional rights mentioned in the complaint. The complaint's only arguable claims of infringement—that the nonpartisan primary violates voters' and parties' freedom of association and that ranked choice voting violates the right to equal protection and the principle of one person, one vote—fail because they rest on a misunderstanding of what Ballot Measure 2 actually does. And Ballot Measure 2 complies with Article III, sections 3 and 8 of the Alaska Constitution, neither of which dictates the use of a particular type of voting system. The Court should therefore grant summary judgment to the State.

ATTORNEY GENERAL, STATE OF ALASKA
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907) 269-5100

II. Facts

A. After signature gathering and litigation, Ballot Measure 2 appeared on the 2020 general election ballot and passed.

In July 2019, Alaskans for Better Elections filed initiative application 19AKBE with the Division of Elections. 19AKBE, which became Ballot Measure 2, had three principal components: it added new disclosure and disclaimer requirements to campaign finance law; it replaced the party primary system with an open, nonpartisan primary; and it established ranked-choice voting in the general election. The Lieutenant Governor determined that combining these components in one initiative violated the single-subject rule, and he declined to certify the initiative.[2] The sponsors sued to challenge that determination.[3] The Alaska Supreme Court ultimately disagreed with the Lieutenant Governor, holding that Ballot Measure 2 concerned a single subject: election reform.[4] The Lieutenant Governor then certified the measure and the sponsors collected sufficient signatures to place it on the 2020 general election ballot.[5]

In the 2020 General Election, Alaskan voters approved Ballot Measure 2—with

ATTORNEY GENERAL, STATE OF ALASKA
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907) 269-5100

---

[2] AK Const. art. XI, sec. 2; AS 15.45.080; *Meyer v. Alaskans for Better Elections*, 465 P.3d 477, 479 (Alaska 2020).

[3] *See Alaskans for Better Elections v. Meyer*, 3AN-19-09704 CI.

[4] *Alaskans for Better Elections*, 465 P.3d 477, 499 (Alaska 2020).

[5] *See* AS 15.45.140(a); https://www.elections.alaska.gov/Core/initiativepetitionlist.php

174,032 "yes" votes to 170,251 "no" votes.[6] The law went into effect in February 2021.[7]

B. Ballot Measure 2 fundamentally altered Alaska's election system.

Ballot Measure 2 fundamentally alters Alaska's election system by eliminating the state-run primary election to nominate political party candidates and substituting an open, nonpartisan primary election, and by adopting ranked-choice voting for the general election. Although Ballot Measure 2 also increases the transparency of campaigns with new disclosure requirements,[8] the other two changes—the only ones challenged in this lawsuit—will have a more immediate impact on voters.

1. Ballot Measure 2 abolished state-run party primaries and replaced them with a single, non-partisan, top-four primary.

Ballot Measure 2 abolishes the state's mandatory primary election and petition process, replacing it with an open, nonpartisan primary system.[9] Under the old system,

---

[6] *See* https://www.elections.alaska.gov/results/20GENR/data/sovc/ElectionSummaryReportRPT24.pdf. This result was confirmed by a hand recount of all electronically tabulated votes. *See* https://www.elections.alaska.gov/results/20GENR/data/sovc/2020BallotMeasure2Audit.pdf. The hand recount showed 173,929 "yes" votes and 170,183 "no" votes. *See id.*

[7] Alaska Const. art. XI, § 6 provides, in part, "An initiated law becomes effective ninety days after certification…"

[8] Ballot Measure 2 modifies Alaska's campaign finance laws—AS 15.13—by requiring new disclosures. Notably, it requires additional disclosures for contributions of more than $2000 to independent expenditure groups, which is intended to reveal the "true source" of such contributions, and defines the term "true source." *See* Ballot Measure 2 at §§ 1(2)-(3), 6-7, 9, 14-18. The bill also requires disclaimers on any paid communications by an independent expenditure group when a majority of the contributors to the group reside outside Alaska. *See* Exhibit A at §§11-12, 19.

[9] *See* Exhibit A at § 20, 72.

ATTORNEY GENERAL, STATE OF ALASKA
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907) 269-5100

the Division of Elections provided primary ballots for each recognized political party.[10] Generally, voters registered as affiliated with a political party voted that party's ballot, and undeclared and nonpartisan voters chose which party's ballot to vote, all subject to the party's bylaws.[11] Candidates selected by this process became their parties' nominees in the general election.[12] Independent candidates—and candidates affiliated with political groups, rather than recognized political parties[13]—accessed the general election ballot by collecting voter signatures on a nominating petition.[14]

The new primary system no longer "serve[s] to determine the nominee of a political party or political group but serves only to narrow the number of candidates whose names will appear on the ballot at the general election."[15] Now, the primary election is open to any candidate, regardless of political affiliation or lack thereof. Those who wish to be candidates in the primary will file a declaration of candidacy.[16] In it, the candidate will either state "the political party or political group with which the candidate is registered as affiliated" or choose to be designated as nonpartisan or

---

[10] AS 15.25.010 (amended Feb. 28, 2021).

[11] *Id.*; AS 15.25.014 (repealed Feb. 28, 2021).

[12] AS 15.25.100 (repealed and reenacted Feb. 28, 2021).

[13] *See* AS 15.80.010(26), defining "political group" as "a group of organized voters which represents a political program and which does not quality as a political party."

[14] *See* AS 15.25.140 *et seq.* (repealed 2020).

[15] AS 15.25.010.

[16] AS 15.25.030. Candidates may not appear as write-in candidates during the primary. AS 15.25.070.

ATTORNEY GENERAL, STATE OF ALASKA
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907) 269-5100

undeclared.[17]

The primary ballot will then indicate the candidate's chosen designation, which will be either their registered political affiliation, or nonpartisan or undeclared.[18] For example, a candidate registered with the Alaska Libertarian Party could choose whether to appear on the primary ballot as "Reg. Libertarian," "Nonpartisan," or "Undeclared."[19] Primary ballots will also include the following disclaimer:

> A candidate's designated affiliation does not imply that the candidate is nominated or endorsed by the political party or group or that the party or group approves of or associates with that candidate, but only that the candidate is registered as affiliated with the political party or political group.[20]

Voters will then receive a single primary ballot and they will vote for any candidate on the ballot, "without limitations based on the political party or political group affiliation of either the voter or the candidate."[21] The four candidates receiving the greatest number of votes for an office will advance to the general election,

---

[17] AS 15.25.030(a)(5).

[18] AS 15.15.030(5) (describing the requirements for general election ballots); AS 15.25.060 (extending those requirements to primary ballots).

[19] *See* Exhibit B, also available at https://www.elections.alaska.gov/doc/PrimBallotSamp2.pdf

[20] AS 15.15.030(14). If a general election ballot includes candidates for President and Vice-President, the disclaimer will also state, "The election for President and Vice-President of the United States is different. Some candidates for President and Vice-President are the official nominees of their political party." AS 15.15.030(15).

[21] AS 15.15.025.

ATTORNEY GENERAL, STATE OF ALASKA
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907) 269-5100

regardless of party affiliation.[22] Accordingly, the candidates in the general election may be registered as affiliated with a political party, but they will not be the nominees of any political party. Candidates who did not appear on the primary ballot or who did not advance out of the primary may also file as write-in candidates in the general election.[23]

In the general election, candidates will again appear on the ballot with their selected designation.[24] Like the primary ballot, the general election ballot will also clearly explain that although the candidates may be registered as affiliated with a certain political party or group, that does not mean they are nominated, endorsed, or approved by that political party or group.[25]

2. Ballot Measure 2 introduced ranked-choice voting in the general election.

Ballot Measure 2's final reform makes ranked-choice voting the means of expressing voters' preferences during the general election.[26] Ranked-choice voting is also used by the state of Maine for federal elections[27] and by some U.S. cities, including New York, Minneapolis, and San Francisco.[28] Under Alaska's previous voting

---

[22] AS 15.25.100(a). If the fourth-place candidates tie, the candidate to advance will be determined by lot. AS 15.25.100(b), (g) (citing AS 15.20.530).

[23] AS 15.25.105.

[24] AS 15.15.030(5).

[25] AS 15.15.030(14); *see* Exhibit C, also available at https://www.elections.alaska.gov/doc/GenRCVballotSamp2.pdf

[26] AS 15.15.350(c).

[27] Me. Rev. Stat. tit. 21-A, § 723-A.

[28] New York City, N.Y., Charter § 1057-g; Minneapolis Code of Ordinances 167.60; San Francisco, CA Charter 13.102.

ATTORNEY GENERAL, STATE OF ALASKA
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907) 269-5100

system—which will still be used in the new nonpartisan primary election—voters' preference is expressed as a single choice for their most favored candidate. In a ranked-choice voting system, voters instead rank the candidates in order of preference, and the Division counts the preferences in a series of rounds.[29] As with single-choice voting, each ballot counts for one vote per race, and the candidate with the greatest number of votes—now expressed as ranked preferences—in the final round of counting will win.[30]

On a ranked-choice ballot, voters will rank the candidates by filling in the ovals that correspond to the available rankings.[31] Voters may choose to rank only one candidate, or they may choose to rank two or more candidates, but they may not give the same ranking to multiple candidates.[32] A voter's "vote" consists of the voter's full set of preferences among the candidates.

For example, in an election with four candidates—like that contemplated by Ballot Measure 2—voters will be able to express their views of the candidates by ranking them first, second, third, and fourth. In fact, because voters will still be permitted to write-in a candidate's name, there will actually be five rankings. Some voters, however, may not have a preference between all of the candidates, and such voters will be free, for example, to rank their first and second choice but—having no

---

[29] *See* AS 15.15.350

[30] *Id.*; AS 15.15.350(d) (directing the Division to count "each validly cast ballot as one vote").

[31] AS 15.15.360(a)(1); *see* Exhibit C.

[32] AS 15.15.350(g)(2); AS 15.15.360(a)(3).

ATTORNEY GENERAL, STATE OF ALASKA
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907) 269-5100

preference between the other two candidates or a hypothetical write-in—list no third, fourth or fifth choice ranking. Other voters, not having any preference for a candidate other than their first choice candidate, can rank that preferred candidate first and not rank any of the others. In each case, the voter's vote expresses the full range of their views about the candidates.

When counting the ballots, the Division will initially count the number of first-choice rankings each candidate received.[33] If a candidate receives more than half of all the first-choice rankings, the process is complete and that candidate is the winner.[34] If the initial count does not reveal the winner, the Division will eliminate the candidate with the fewest first-choice rankings.[35] The ballots of voters who ranked the now-eliminated candidate first will no longer count for that candidate, but will instead be counted for the voters' second-ranked candidate.[36] If a voter has not expressed a preference among the remaining candidates, that voter's vote will count for the eliminated candidate in the final results, and the voter's ballot is not included in further rounds of tabulation.[37] If only two candidates remain after a candidate is eliminated, the

ATTORNEY GENERAL, STATE OF ALASKA
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907) 269-5100

---

[33] AS 15.15.350(d). If a voter did not fill in the first-choice oval, the Division will count that voter's highest-ranked candidate as the voter's first choice. *Id.* ("highest-ranked continuing candidate").

[34] AS 15.15.350(d).

[35] AS 15.15.350(d)(2). If two candidates tie for the fewest first-choice rankings, the loser is determined by drawing lots. AS 15.15.350(e)(3).

[36] *Id.*

[37] AS 15.15.350(d)(2), .350(g)(2).

candidate with the greatest number of votes is the winner.[38] If more than two candidates remain, the process repeats until only two candidates are left and one of those candidates wins.[39] Ranked-choice voting is sometimes referred to as "instant runoff voting," because it allows voters to express their preferences among candidates on a single ballot, and those preferences are used to identify the winning candidate in successive rounds of counting —*i.e.* "instantly"—rather than having one or more runoff elections to winnow the field of candidates.

C. Kohlhaas sued, bringing a facial challenge to the constitutionality of Ballot Measure 2.

Kohlhaas filed suit on December 1, 2020,[40] and amended his complaint several times. His Second Amended Complaint alleges that Ballot Measure 2 violates multiple provisions of the federal and state constitutions.[41] Specifically, he alleges that the open, nonpartisan primary violates his right to free political association by "prevent[ing political parties] from selecting their candidates and having their candidates meaningfully identified on the ballots."[42] He also alleges that ranked-choice voting violates the "principle of 'one person, one vote,'" because it requires voters to rank multiple candidates or "lose their right to vote," and because it may not lead to "a

---

38 AS 15.15.350(d)(1).

39 *Id.* If the last two candidates tie, even after the Division conducts a recount, the winner will be determined by lot. AS 15.15.350(e)(3) (citing AS 15.15.460, AS 15.20.430-.530).

40 Compl. at p.9.

41 *See e.g.*, Second Amended Compl. at ¶¶ 1, 11-14.

42 *Id.* at ¶ 13.

ATTORNEY GENERAL, STATE OF ALASKA
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907) 269-5100

majority result."[43] Further, he claims that Ballot Measure 2 has a "disparate impact on Alaska Native and rural communities."[44] Finally, he claims that the "election system implemented by [Ballot Measure] 2 violates" Article III, §§ 3 and 8 of the Alaska Constitution and "is void as it applies to the election of the governor and lieutenant governor."[45] Along with these potential constitutional claims, he argues that Ballot Measure 2 is not severable because of *Alaskans for Betters Elections v. Meyer*, where the Alaska Supreme Court concluded that the measure complies with the single-subject rule despite its three major reforms.[46] He seeks declaratory and injunctive relief.[47]

III. Legal standard

"A party raising a constitutional challenge to a statute bears the burden of demonstrating the constitutional violation. A presumption of constitutionality applies, and doubts are resolved in favor of constitutionality."[48] "The analysis of a constitutional provision begins with, and remains grounded in, the words of the provision itself;" the court is "not vested with the authority to add missing terms or hypothesize differently worded provisions … to reach a particular result."[49] Rather, the court "look[s] to the

---

[43] *Id.* at ¶ 14.

[44] *Id.* at ¶ 19.

[45] *Id.* at ¶ 24.

[46] *Id.* at ¶ 20.

[47] *Id.* at p.9.

[48] *State v. Andrade*, 23 P.3d 58, 71 (Alaska 2001) (quoting *Baxley v. State*, 958 P.2d 422, 428 (Alaska 1998)).

[49] *Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017) (quoting *Hickel v. Cowper*, 874 P.2d 922, 927-28 (Alaska 1994)).

ATTORNEY GENERAL, STATE OF ALASKA
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907) 269-5100

intent of the framers"[50] and "adopt[s] the rule of law that is most persuasive in light of precedent, reason, and policy."[51]

Kohlhaas's complaint makes a facial challenge to Ballot Measure 2, because no election has yet been held pursuant to its requirements.[52] Courts "uphold a statute against a facial constitutional challenge if 'despite occasional problems if might create in its application to specific cases, [it] has a plainly legitimate sweep."[53] Moreover, a facial challenge is especially appropriate for resolution on summary judgment—because there are no facts regarding the application of the statute to dispute and "[s]ummary judgment is proper if there is no genuine factual dispute and the moving party is entitled to judgment as a matter of law."[54]

Alaska courts and federal courts apply essentially the same balancing test to evaluate constitutional challenges to state election laws.[55] The court first determines

ATTORNEY GENERAL, STATE OF ALASKA
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907) 269-5100

---

[50] *Thomas v. Rosen*, 569 P.2d 793, 795 (Alaska 1977) (citing *Warren v. Boucher*, 543 P.2d 731, 735 (Alaska 1975)).

[51] *Alaskans for a Common Language v. Kritz*, 170 P.3d 183, 192 (Alaska 2007).

[52] *See e.g.*, *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 455-56 (2008) (noting that challenge to Washington initiative creating a nonpartisan primary was facial challenge with no evidentiary record to support speculation about implementation or possible voter confusion).

[53] *State v. Planned Parenthood of Alaska*, 171 P.3d 577, 581 (Alaska 2007) (quoting *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 260 n.14 (Alaska 2004)).

[54] *Devine v. Great Divide Ins. Co.*, 350 P.3d 782, 785-86 (Alaska 2015).

[55] *State, Div. of Elections v. Green Party of Alaska (Green Party of Alaska I)*, 118 P.3d 1054, 1060 (Alaska 2005) (explicitly adopting federal test for "evaluating whether [a] challenged election law violates the Alaska Constitution."); *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989).

whether the plaintiff has asserted a constitutional right.[56] The court then weighs "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments . . . against the precise interests put forward by the State . . . ."[57] Lastly, the court judges the "fit between the challenged legislation and the state's interests."[58] The more severe the burden on the constitutional rights, the more compelling the state's interests must be and the closer the fit between the interest and the law.[59] "When a state electoral provision places no heavy burden on associational rights, 'a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.'"[60]

IV. Argument

Kohlhaas claims that Ballot Measure 2 violates a host of rights, including the rights of "free political association, political expression, free speech, free assembly, and to petition the government for redress of grievances"[61] under the U.S. Constitution, and "to free speech, to assemble, to petition the government for redress of grievances, and to

---

56 *Green Party of Alaska I*, 118 P.3d at 1061.

57 *Id.* at 1059 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

58 *Id.* at 1061.

59 *Id.*; *see also*, *State v. Alaska Democratic Party*, 426 P.3d 901, 907 (Alaska 2018) ("This is a flexible test: as the burden on constitutionally protected rights becomes more severe, the government interest must be more compelling and the fit between the challenged legislation and the state's interest must be closer.")

60 *Clingman v. Beaver*, 544 U.S. 581, 593 (2005) (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 351 (1997)).

61 Second Amended Compl. at ¶ 11.

ATTORNEY GENERAL, STATE OF ALASKA
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907) 269-5100

privacy" under the Alaska Constitution.[62] But his complaint does not explain how Ballot Measure 2 affects many of these rights at all, much less unconstitutionally burdens them. This memorandum focuses on the only claims that the complaint elucidates: that the nonpartisan primary infringes on voters' and parties' freedom of association and that ranked-choice voting violates the right to equal protection and the principle of one person, one vote.

These claims rest primarily on Kohlhaas's failure to understand what Ballot Measure 2 actually does. His challenges to the new primary election fail to recognize that it is not a vehicle for selecting political party nominees, but rather the first stage of a two-stage election in which party candidates compete equally with independent or nonpartisan candidates. Although free association principles limit the ways in which a state may control *political parties'* nomination processes, under Ballot Measure 2 the State will no longer play any part in how political parties choose nominees. Thus, the new system does not substantially burden the parties' or voters' associational rights; and any minimal burden it may impose is easily justified by the State's interests.

Similarly, Kohlhaas's claims about ranked-choice voting misunderstand how the new ballot tabulating system works. Because each voter casts only a single vote—which ranks all the candidates—and each voter has the same opportunity to rank as many candidates as they want, ranked-choice voting does not violate the principle of one-person, one-vote or any other constitutional right.

---

[62] Second Amended Compl. at ¶ 12.

ATTORNEY GENERAL, STATE OF ALASKA
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907) 269-5100

Finally, Kohlhaas's claim that Ballot Measure 2 violates Article III, §§ 3 and 8 of the Alaska Constitution also lacks merit. Because Ballot Measure 2's tabulation process results in winning candidates who have received "the greatest number of votes," it complies with Article III, §§ 3 and 8.

A. Ballot Measure 2's nonpartisan primary does not violate political parties' associational right to choose their nominees.

The right to free political association is guaranteed by the First and Fourteenth Amendments to the U.S. Constitution and Article I, § 5 of the Alaska Constitution.[63] It "guarantees the rights of people, and political parties, to associate together to achieve their political goals."[64] "[A] corollary of [this] right to associate is the right not to associate."[65] Accordingly, under the First and Fourteenth Amendments to the U.S. Constitution, state election laws may not contravene party rules by allowing non-members to vote on the party's nominees[66] or by preventing non-members from voting on the party's nominees.[67] Nor may states prohibit a party's governing body from endorsing the party's nominees.[68] Similarly, under the Alaska Constitution, the State may not prevent parties from selecting their nominees using a two-party ballot[69] or

---

63 *See Alaska Democratic Party*, 426 P.3d at 906–7.

64 *Id.* at 906. (Emphasis omitted).

65 *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000).

66 *Id.* at 586.

67 *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 225 (1986).

68 *Eu*, 489 U.S. at 229.

69 *Green Party of Alaska I*, 118 P.3d at 1070.

ATTORNEY GENERAL, STATE OF ALASKA
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907) 269-5100

prohibit non-members from running for a party's nomination.[70]

But no precedent supports Kohlhaas's claim that Ballot Measure 2's open, nonpartisan primary burdens these associational rights. To the contrary, the United States Supreme Court has held that open, nonpartisan primaries are constitutional.[71] In *Washington State Grange v. Washington State Republican Party*, the Court considered a successful voter initiative in Washington that created a primary nearly identical to that created by Ballot Measure 2.[72] In it, candidates appeared on a single primary ballot, where they were designated by their chosen "major or minor party preference, or independent status."[73] The top two candidates advanced to the general election, regardless of the party affiliation of the voter or the candidates.[74] Regulations explained that the primary "does not serve to determine the nominees of a political party but serves to winnow the number of candidates to a final list of two for the general election."[75]

---

70 *Alaska Democratic Party*, 426 P.3d at 915.

71 *Washington State Grange*, 552 U.S. at 459. *See also*, *California Democratic Party*, 530 U.S. at 585–86 (Noting, in *dicta*, that a nonpartisan primary "has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee. Under a nonpartisan blanket primary, a State may ensure more choice, greater participation, increased "privacy," and a sense of "fairness"—all without severely burdening a political party's First Amendment right of association.")

72 *Washington State Grange*, 552 U.S. at 447.

73 *Id.* (quoting Wash. Rev.Code § 29A.24.030 (repealed 2004)).

74 *Id.*

75 *Id.* at 453 (quoting Wash. Admin. Code § 434-262-012 (repealed)) (internal quotation marks omitted).

ATTORNEY GENERAL, STATE OF ALASKA
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907) 269-5100

The party challenging the initiative argued this open, nonpartisan primary violated its right to political association by "usurping its right to nominate its own candidates and by forcing it to associate with candidates it does not endorse."[76] The Court found this argument had a "fatal flaw:" Washington's system did not select the party's nominees, so it did not severely burden the party's right of political association.[77] "The essence of nomination—the choice of a party representative—does not occur" in an open, nonpartisan primary.[78] Thus, the state did not usurp the party's right to select its own candidates; parties could still nominate candidates "by whatever mechanism they choose," and whether they did so "outside the state-run primary is simply irrelevant."[79]

Kohlhaas' political association claim here suffers from the same fatal flaw: Just like Washington's primary, Alaska's open, nonpartisan primary will not select party nominees. And Ballot Measure 2, like Washington's laws and regulations, clearly states that the primary will not "serve to determine the nominee of a political party or political group but serves only to narrow the number of candidates . . . ."[80] The general election candidates, therefore, will not be the nominees of the Republican, Alaska Libertarian, or

---

76 *Id.* at 448.

77 *Id.* at 453–54. 458.

78 *Id.* at 453.

79 *Id.*

80 AS 15.25.010.

ATTORNEY GENERAL, STATE OF ALASKA
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907) 269-5100

Alaskan Independence parties, as Kohlhaas suggests.[81] If these parties wish to nominate candidates in advance of the primary election, they are free to do so.[82] Indeed, the parties currently select their nominees for president and vice president without state involvement, so they are perfectly capable of doing this.[83]

Kohlhaas suggests that a political party has a "right to nominate its candidates in accord with its party rules and principles."[84] But he conflates that right with the right to a *state-run* nominating process—something that neither the state nor federal constitution provides. The First Amendment protects parties' and voters' associational interests from state interference, but it does not simultaneously require states to involve themselves in parties' nomination processes. In other words, if a state decides to require political parties to nominate their candidates through a state-run primary election, it cannot restrict parties' and voters' ability to freely associate with each other in that primary election. But nothing in the state or federal constitutions requires that a state involve itself in political parties' nomination of candidates in the first place.

State v. Alaska Democratic Party does not suggest otherwise, even though the Alaska Supreme Court characterized the associational right at issue in that case as the

---

[81] *See* Second Amended Compl. at ¶ 2 ([Republican] Party's candidate"), 3 ("Libertarian candidate"), 4 ("[Alaskan Independence Party] candidate"). At least, although the general election candidates *may be* the nominees of their political parties—if parties choose to nominate candidates in some other way—they will not be the nominees by virtue of their victory in the primary election.

[82] *Washington State Grange*, 552 U.S. at 453.

[83] *See* AS 15.30.020.

[84] Second Amended Compl. at ¶ 7.

ATTORNEY GENERAL, STATE OF ALASKA
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907) 269-5100

party's "right to choose its general election nominees."[85] Taken out of context, this language could be read to suggest that political parties have a constitutional right to nominate candidates who will appear on the general election ballot. But this is incorrect. The Court's language merely described the political parties' rights in the context of the existing statutory scheme, which required them to nominate candidates through state-run party primary elections.[86] The Court did not decide—because the question was not before it—that political parties have a right to a state-run primary election or guaranteed access to the general election ballot. No legal authority supports either proposition.

First, party primaries are creatures of statute, not the constitution. Nothing in the federal or state constitution requires the State either to hold a primary election or to provide a means by which political parties select the candidates they will support for elective office.[87] In fact, during the Alaska constitutional convention debates Delegate Victor Rivers explained that the constitution did not provide the means for nominating candidates because the delegates intended to leave flexibility for future changes:

> *There might not always be a primary.* There might be some time when nominating conventions will be reverted to as they are in some states. So if we pinpointed the matter of a primary in this thing, we might then pin down the type of the nominating elections we would have in the state for all time to come.[88]

---

[85] *Alaska Democratic Party*, 426 P.3d at 909.

[86] *See* AS 15.25.010 *et seq.* (repealed Feb. 28, 2021).

[87] *See California Democratic Party*, 530 U.S. at 585-86 (seeing noting constitutional problem with a nonpartisan blanket primary.

[88] Proceedings of the Constitutional Convention (Jan. 13, 1956) at 2044-45. (Emphasis added).

ATTORNEY GENERAL, STATE OF ALASKA
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907) 269-5100

Second, it is well-established that the State may impose reasonable requirements to limit access to the general election ballot.[89] And Ballot Measure 2 creates a system that is *more* accessible, not less, because anyone may file to run in the open, nonpartisan primary that it creates.[90] Although only the top four candidates advance to the general election, independent candidates and minor political parties will have to expend much less effort and resources to file for the primary election. And a candidate who is not among the top four most popular candidates in the primary election is unlikely to have much chance in the general election. Thus, Kohlhaas's claim that minor political parties will be harmed by the open nonpartisan primary[91] makes little sense.

Thus, *Alaska Democratic Party* stands only for the proposition that the parties may control which voters and candidates can participate in any state-run party primary that serves to choose the party's nominees, not that the party has a right to access the general election ballot even if its nominees do not prevail in the nonpartisan primary election. In a system where the State is not participating in the parties' selection of their nominees, the State cannot be burdening the parties' right to select nominees.

Here, Alaska voters, exercising their constitutional right to "enact laws by initiative" and relying on the State's "broad power" to regulate elections for federal and

---

89 *See State, Div. of Elections v. Metcalfe*, 110 P.3d 976 (Alaska 2005); *Green Party of Alaska v. State, Div. of Elections*, 147 P.3d 728 (Alaska 2006).

90 *See* AS 15.25.030.

91 *See* Second Amended Compl. at ¶ 15.

ATTORNEY GENERAL, STATE OF ALASKA
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907) 269-5100

state offices, have changed state law to eliminate partisan primaries.[92] Kohlhaas has no right to state-run primaries that select party nominees, so eliminating these primaries and establishing open, nonpartisan primaries does not infringe on his right to political association or any other constitutional right.[93] Whether the parties choose to conduct their own primaries is "simply irrelevant" to their political association claim.[94]

Because the open, nonpartisan primary will not select party nominees, it "does not impose any severe burden" on Kohlhaas's right to political association.[95] The State, therefore, needs only an important regulatory interest to justify it.[96] Section 1 of Ballot Measure 2 lays out the "Findings and Intent" behind the initiative, declaring:

> It is in the public interest of Alaska to adopt a primary election system that is open and nonpartisan, which will generate more qualified and competitive candidates for elected office, boost voter turnout, better reflect the will of the electorate, reward cooperation, and reduce partisanship among elected officials.

Boosting voter turnout and holding elections that better reflect the will of the electorate are plainly important regulatory interests that easily justify the use of a nonpartisan blanket primary.

The State also has an interest in effectuating the people's vote to eliminate

---

92 AK Const., Art. 11, § 1; *see also Tashjian*, 479 U.S. 217 (citing U.S. Const. art. I, § 4, cl. 1)).

93 *Washington State Grange*, 552 U.S. at 453, n.7.

94 *Id.* Notably, if the parties do conduct party primaries, they do not have "a right to have their nominees designated as such on the ballot." *Id.* at 453 n.7.

95 *Id.* at 458.

96 *Id.*

ATTORNEY GENERAL, STATE OF ALASKA
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907) 269-5100

partisan primaries. By passing Ballot Measure 2, Alaska voters decided to "get rid of the party primary system" that currently existed.[97] Kohlhaas suggests that the State and its voters were motivated by a desire to render political parties "irrelevant."[98] But political parties remain relevant, because they are free to nominate and endorse candidates, and under Alaska's campaign finance laws, they are permitted to make and receive larger political contributions than individuals or other groups.[99] And the State and its voters have a valid interest in reducing the role parties play in primaries by establishing a nonpartisan primary system.[100] Indeed, the State has no valid interest in *protecting* political parties from competition.[101] The State, therefore, has a sufficient interest in changing its primary system, and Ballot Measure 2 is constitutional.

The state constitution, although "more protective of political parties' associational interests than is the federal constitution," does not demand a different result.[102] The cases in which the Alaska Supreme Court has found the state constitution more protective of associational rights are distinguishable in ways that make them

---

97 Ballot Measure 2 Ballot Language, https://www.elections.alaska.gov/petitions/19AKBE/19AKBE%20-%20Ballot%20Language%20Summary.pdf.

98 Second Amended Compl. at ¶ 13.

99 *See* AS 15.13.070.

100 *See Washington State Grange*, 552 U.S. at 453.

101 *Green Party of Alaska I*, 118 P.3d at 1068 (quoting *Clingman*, 544 U.S. at 609 (Stevens, J., dissenting)) ("States do not have a valid interest in . . . protecting the major parties from competition . . . .").

102 *Alaska Democratic Party*, 426 P.3d at 909.

ATTORNEY GENERAL, STATE OF ALASKA
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907) 269-5100

inapposite here. In two companion cases, both titled *Vogler v. Miller*, the Court held the Alaska Constitution precluded ballot access restrictions that would have passed muster under the federal constitution because they were too strict for purposes of the Alaska Constitution.[103] But Ballot Measure 2 opens the new nonpartisan primary to all-comers and thus imposes no burden on ballot access whatsoever.

The Court has also departed from federal precedent to hold that parties and voters are significantly burdened when voters are forced to register with a party in order to vote for the party's nominees or run for the party's nomination.[104] But Ballot Measure 2 does not impose any comparable obligations on voters, parties, or candidates.

Thus, there is no reason to believe the state constitution is so protective of the right to political association that it grants Kohlhaas the right to a state-run, closed, and partisan primary, where the federal constitution does not.[105] Indeed, Alaska used to use a "blanket" party primary system in which any voter could vote for any candidate, and the winning candidates becomes the nominees of their parties. And the Alaska Supreme Court held that this blanket primary was constitutional in *O'Callaghan v. State*.[106] Given *O'Callaghan*, which upheld a blanket *partisan* primary, it seems unlikely that the

---

[103] *Vogler v. Miller*, 651 P.2d 1, 4–6 (Alaska 1982); *Vogler v. Miller*, 660 P.2d 1192, 1194-95 (Alaska 1983).

[104] *Alaska Democratic Party*, 426 P.3d at 909–10 (citing *Green Party of Alaska I*, 118 P.3d at 1065).

[105] *See Washington State Grange*, 552 U.S. at 453.

[106] *O'Callaghan v. State*, 914 P.2d 1250, 1263 (Alaska 1996). Alaska's blanket primary was abandoned after the U.S. Supreme Court struck down California's blanket primary in *California Democratic Party*, 530 U.S. at 574.

ATTORNEY GENERAL, STATE OF ALASKA
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907) 269-5100

Alaska Supreme Court would invalidate Ballot Measure 2's *nonpartisan* primary, which does not select party nominees. Because Kohlhaas misunderstands this fundamental aspect of open, nonpartisan primaries, his political association claim fails.

B. Ballot Measure 2's party preference designations do not violate political parties' associational right to choose their nominees.

The Washington initiative considered in *Washington State Grange* implicated the party's freedom of association in only one conceivable way: by allowing candidates to indicate a party preference on the ballot.[107] But the U.S. Supreme Court rejected the claim that this forced parties to associate with candidates they did not endorse. Washington's laws and regulations made it clear that the general election candidates were not the nominees of any party.[108] And the Court doubted voters would nevertheless mistakenly believe the candidates were party nominees, holding that a facial challenge cannot survive "on the mere possibility of voter confusion."[109] Having found that Washington's primary did not select party nominees and so did not severely burden associational rights, the Court held that the state's interest in providing relevant information about candidates to voters "easily" justified the inclusion of candidates' party preference on the ballot.[110]

---

107 *Washington State Grange*, 552 U.S. at 448-49.

108 *Id.* at 453.

109 *Id.* at 454 ("There is simply no basis to presume that a well-informed electorate will interpret a candidate's party-preference designation to mean that the candidate is the party's chosen nominee or representative or that the party associates with or approves of the candidate.").

110 *Id.* at 458.

ATTORNEY GENERAL, STATE OF ALASKA
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907) 269-5100

Kohlhaas thus cannot sustain a facial challenge to Ballot Measure 2 by raising the possibility that voters will confuse a candidate's registered party affiliation for the party's endorsement or nomination.[111] There is not—and cannot yet be—any evidence of voter confusion. Moreover, Alaskan voters are even less likely to be confused than Washington voters. Unlike the Washington initiative, Ballot Measure 2 requires candidates to be registered with a party if they choose to be designated as affiliated with that party.[112] This reduces the possibility that candidates will claim an allegiance to a party with which they have no connection at all.

More importantly, Ballot Measure 2 expressly requires that primary and general election ballots include prominent disclaimers, stating: "A candidate's designated affiliation does not imply that the candidate is nominated or endorsed by the political party or group . . . ."[113] Both the U.S. Supreme Court and the Alaska Supreme Court have endorsed disclaimers like these as a way to avoid voter confusion.[114] Along with

---

111 *See Washington State Grange*, 552 U.S. at 454.

112 *Id.* at 447 ("A political party cannot prevent a candidate who is unaffiliated with, or even repugnant to, the party from designating it as his party of preference."); AS 15.15.030(5) ("If a candidate is registered as affiliated with a political party or political group, the party affiliation, if any, may be designated after the name of the candidate, upon request of the candidate.").

113 AS 15.15.030(14).

114 *Washington State Grange*, 552 U.S. at 456 (noting voter confusion is unlikely because the "ballot could include prominent disclaimers explaining that party preference reflects only the self-designation of the candidate and not an official endorsement by the party"); *Alaska Democratic Party*, 426 P.3d at 913 (noting voters could be educated by "prominent disclaimers explaining that a candidate's party affiliation denotes only the candidate's voter registration and nothing more").

ATTORNEY GENERAL, STATE OF ALASKA
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907) 269-5100

the disclaimer, Alaska's ballots will also indicate that candidates are merely registered with political parties or groups—rather than nominated or endorsed by them—by including "Reg." before the candidates' party affiliations.[115] These ballot-design measures will be reinforced by the public education campaign Ballot Measure 2 requires the Division to conduct, further reducing the possibility of voter confusion.[116]

Both the U.S. Supreme Court and the Alaska Supreme Court have cast doubt on the argument that party designations will confuse voters into believing that candidates are party nominees, thereby implicating associational rights. The U.S. Supreme Court has recognized that while a candidate's party designation is a useful "shorthand designation" of the candidate's views, voters are not easily "misled by party labels."[117] Voters instead have the ability "to inform themselves about campaign issues."[118] The Alaska Supreme Court has been "equally confident that Alaska voters would have little trouble understanding and choosing between combined ballots," which include candidates with multiple party designations, much like nonpartisan primary ballots.[119] The Alaska Supreme Court has also been confident in the Division's ability "to design a ballot that voters can understand."[120] In *State v. Alaska Democratic Party*, it found "no

---

115 *See* Exhibits B and C.

116 *See* Exhibit A at § 74.

117 *Tashjian*, 479 U.S. at 220.

118 *Id.* (citing *Anderson v. Celebrezze*, 460 U.S. 780, 797 (1983)).

119 *State, Div. of Elections v. Green Party of Alaska*, 118 P.3d 1054, 1068 (Alaska 2005).

120 *State v. Alaska Democratic Party*, 426 P.3d 901, 913 (Alaska 2018).

ATTORNEY GENERAL, STATE OF ALASKA
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907) 269-5100

basis for predicting that Alaska voters will be unable to understand" the distinction between a party's nominee and a candidate who is merely registered with a particular party.[121]

Nor do parties have a right to have "their candidates meaningfully identified on the ballots which are provided to the voter," as Kohlhaas suggests.[122] Although courts have occasionally invalidated regulations relating to the way candidates are identified on ballots,[123] they have done so because those regulations infringed on the "core political speech" of the *candidates* not political parties. And Ballot Measure 2 allows the candidates to identify themselves as registered with a political party or not as they choose. "The First Amendment does not give political parties a right to have their nominees designated as such on the ballot."[124] As the Ninth Circuit has noted: "A ballot is a ballot, not a bumper sticker. Cities and states have a legitimate interest in assuring that the purpose of a ballot is not 'transform[ed] ... from a means of choosing candidates to a billboard for political advertising.'"[125]

In the absence of any evidence—or likelihood—of confusion, the State need only

---

121 *Id.*

122 *See* Second Amended Compl. at ¶ 13.

123 *See e.g., Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992) (invalidating regulation prohibiting the political party designation of "Independent" while permitting "Republican" or "Democrat" designations, on basis that party labels designate views of candidates and the regulations therefore hinder "core political speech.")

124 *Washington State Grange* 552 U.S. at 453 n.7.

125 *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1016 (9th Cir. 2002) (quoting *Timmons*, 520 U.S. at 365).

ATTORNEY GENERAL, STATE OF ALASKA
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907) 269-5100

show an important regulatory interest in Ballot Measure 2's provision allowing candidates to identify their party registration status on the ballot. And, like Washington, Alaska has an interest in providing relevant information about candidates, including their registered party affiliation or other chosen designation.[126] "There can be no question about the legitimacy of [this interest]" and it "easily" justified Washington's primary, so it justifies the nearly identical provision in Ballot Measure 2.[127]

C. Ballot Measure 2's ranked-choice voting system does not violate equal protection or "one person, one vote."

Kohlhaas claims that the introduction of ranked-choice voting for the general election violates the principle of "one person, one vote," established by the U.S. Supreme Court in a series of redistricting cases in the 1960s.[128] Not so. Under ranked-choice voting, every voter has the same opportunity to vote—ranking as many or as few candidates as the voter wishes—the voter's "vote" consists of the *rankings as a whole* rather than a series of separate votes for candidates, and every vote is counted through the same process of tabulating the voter's preferences in a series of rounds. At the end of the tabulation, each voter's vote is counted for only one candidate. Thus, ranked-choice voting does not violate equal protection or the principle of one person, one vote.

Kohlhaas's claims illustrate his confusion over how ranked-choice voting works. First, Kohlhaas alleges that it "require[s] the counting of votes of those who vote for the

---

126 *Washington State Grange*, 552 U.S. at 458.

127 *Id.* (quoting *Anderson*, 460 U.S. at 796).

128 *See e.g.*, *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964).

ATTORNEY GENERAL, STATE OF ALASKA
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907) 269-5100

more popular candidates more than once in determining the final result."[129] But he also claims that it "allow[s] those voters whose second or lower level votes are assigned to another candidate because their first or other choice was dropped to cast a second or third vote for another candidate."[130] In effect then, he complains *both* that voters who prefer candidates who continue through to later rounds of tabulation have their votes counted "more than once," *and* that voters who prefer less popular candidates—i.e. those who don't continue to later rounds—get to vote again in the later rounds for other candidates. But these complaints are off-setting, since together they recognize that voters who rank all the candidates have their votes counted in each round of tabulation. Thus, "a first-choice vote for a continuing candidate may compete against a second or third choice of another voter [in later rounds of tabulation], but only one at a time, and each time each voter's vote counts only as a single vote."[131]

The Ninth Circuit—in an opinion upholding the constitutionality of San Francisco's similar system—aptly summarized ranked-choice voting as follows:

> the option to rank multiple *preferences* is not the same as providing additional *votes,* or more heavily-weighted votes, relative to other votes cast. Each ballot is counted as no more than one vote at each tabulation step, whether representing the voters' first-choice candidate or the voters' second- or third-choice candidate, and each vote attributed to a candidate, whether a first-, second- or third-rank choice, is afforded the same mathematical weight in the election. The ability to rank multiple candidates simply provides a chance to have several preferences recorded

---

[129] Second Amended Compl. at ¶ 14.

[130] *Id.*

[131] *Minnesota Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683, 692 (Minn. 2009).

ATTORNEY GENERAL, STATE OF ALASKA
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907) 269-5100

and counted *sequentially,* not at once.[132]

Voters have only one ballot and only one opportunity to rank the candidates; each voter may express the same number of preferences; all ballots are tabulated according to a single set of rules; and although there may be several steps, or rounds, in the tabulation, no additional votes are cast during the process. Properly understood, then, ranked-choice voting treats voters—and their votes—equally and thus does not violate either the state or federal constitution's guarantees of equal protection.

Kohlhaas also alleges that ranked-choice voting "force[s] those voters who support and/or vote for only a single candidate to vote for someone the voters do not support or lose their right to vote when the voters' single votes are not counted in determining the final result."[133] But a voter who ranks only a first choice candidate and expresses no other preference does not somehow "lose" the right to vote—on the contrary, her vote is counted in determining the final result. If, after the first step in the tabulation, there is no winner, and a voter ranked only one candidate, one of two things will happen: the voter's preferred candidate is eliminated and the voter's vote will be shown as a vote for that losing candidate, just as it would be under the old, single-choice voting system. Or, if the voter's candidate is not eliminated, the voter's preference for that candidate will continue to count for that candidate in later rounds of tabulation. As the Massachusetts Supreme Court explained in a case examining the City of

---

132 *Dudum v. Arntz*, 640 F.3d 1098, 1112 (9th Cir. 2011).

133 Second Amended Compl. at ¶ 14.

ATTORNEY GENERAL, STATE OF ALASKA
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907) 269-5100

Cambridge's use of ranked choice voting: "[Inactive ballots] too are read and counted; they just do not count toward the election of any of the [ultimately] successful candidates. Therefore it is no more accurate to say that these ballots are not counted than to say that the ballot designating a losing candidate in a two-person, winner-take-all race are not counted."[134]

Kohlhaas's final allegation is that ranked choice voting does not "necessarily" guarantee "a majority result."[135] This is true,[136] but irrelevant. Neither the federal constitution nor the Alaska Constitution contains a majority threshold requirement for election to office. In contrast, some states require that officeholders must win a majority to be elected, and allow for runoff elections when this threshold is not met.[137] But no majority is required under the Alaska Constitution; indeed, if it were, the old single-choice voting system with no runoff would be just as unconstitutional.

In sum, Kohlhaas's claims reflect a failure to understand the new system, rather

---

134 *McSweeney v. City of Cambridge*, 665 N.E.2d 11, 14 (Mass. 1996).

135 Second Amended Compl. at ¶ 14.

136 A candidate wins with a majority of the remaining *active* ballots. *See* AS 15.15.350. Because inactive ballots are excluded from later rounds of tabulation (and simply count for a now-excluded candidate), if a sufficient number of ballots become inactive, a candidate with a majority of active ballots might not have a majority of all the ballots cast in the race.

137 *See e.g.*, GA Const. Art. 2, § 2, ¶ 11 (providing for run-off election); GA ST § 21-2-501 ("[N]o candidate shall be nominated for public office in any primary or special primary or elected to public office in any election or special election unless such candidate shall have received a majority of the votes cast to fill such nomination or public office.")

ATTORNEY GENERAL, STATE OF ALASKA
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907) 269-5100

than any genuine constitutional problems with ranked-choice voting, as reflected in the court decisions upholding the constitutionality of this voting system.[138] The only exception the State is aware of is an opinion from the Maine Supreme Court holding that ranked-choice voting was inconsistent with the Maine Constitution's direction that the winner of an election was the candidate who "shall appear to have been elected by a plurality of all votes returned."[139] The Court implicitly assumed that each individual preference for a candidate constituted a distinct vote, and expressly assumed that use of the term "plurality" meant that the Maine Constitution contemplated only one round of counting votes—after which some candidate would be ahead with at least a plurality of the votes; and that that candidate must be the winner.[140]

But as explained above, and as the Ninth Circuit and several state courts have recognized, a "vote" in a ranked-choice voting system consists of the full statement of the voter's preferences—*i.e.* all the voter's rankings together, not each one separately—and the votes have not been counted until the tabulation is complete. Thus, the Maine court's analysis is not persuasive. And even if it were, Alaska's constitution does not contain comparable "plurality" language. Indeed, the only office for which any vote

---

[138] *See e.g.*, *McSweeney v. City of Cambridge*, 665 N.E.2d 11 (Mass. 1996); *Dudum v. Arntz*, 640 F.3d 1098 (9th Cir. 2011); *Minnesota Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683, 692 (Minn. 2009); *Baber v. Dunlap*, 376 F.Supp.3d 125 (D.Me. 2018).

[139] *Opinion of the Justices*, 162 A.3d 188, 194 (Me. 2017) (quoting ME Const. Art. IV, Part First, § 5).

[140] *Id.* at 211 (characterizing amendments to the constitution as providing that "an election is won by the candidate that first obtains 'a plurality of' all votes returned," although the phrase "first obtains" does not appear in the constitutional language.)

ATTORNEY GENERAL, STATE OF ALASKA
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907) 269-5100

threshold is established in the constitution is the governor—in Article III, § 3. That provision is discussed below.

Because ranked-choice voting does not burden any constitutional rights, the court need not consider the rest of the balancing test. But if the court were to find that this voting system does impose some burden on the right to vote, it is not severe and thus the State need only show an important regulatory interest.[141] The "Findings and Intent" section of Ballot Measure 2 identifies the state interests as follows:

> It is in the public interest of Alaska to adopt a general election system that reflects the core democratic principle of majority rule. A ranked-choice voting system will help ensure that the values of elected officials more broadly reflect the values of the electorate, mitigate the likelihood that a candidate who is disapproved by a majority of voters will get elected, encourage candidates to appeal to a broader section of the electorate, allow Alaskans to vote for the candidates that most accurately reflect their values without risking the election of those candidates that least accurately reflect their values, encourage greater third-party and independent participation in elections, and provide a stronger mandate for winning candidates.[142]

These interests are more than sufficient to justify any minimal burden that ranked-choice voting imposes on voters. After all, no voting system is perfect,[143] but states must use some system for conducting elections. Single-choice voting with a plurality threshold to win may be simple and easy to understand, but it can also result in

---

[141] *Dudum*, 640 F.3d at 1106 ("We have repeatedly upheld as '"not severe" restrictions that are generally applicable, even-handed, politically neutral, and ... protect the reliability and integrity of the election process.'")

[142] Exhibit A, § 1(5).

[143] *Dudum*, 640 F.3d at 1103 (citing David M. Farrell, *Electoral Systems: A Comparative Introduction* 47 (2001)).

ATTORNEY GENERAL, STATE OF ALASKA
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907) 269-5100

the victory of a candidate whom the majority of voters strongly disfavor or a candidate who wins only a small minority of votes in a big field or both.[144] Ranked-choice voting may be slightly more complicated—and that appears to be the basis for Kohlhaas's speculative claim that "Proposition 2 would disproportionately harm rural, particularly Alaskan native, communities"[145]—but it allows voters to "express nuanced voting preferences and elect[] candidates with strong plurality support."[146] Weighing the advantages and disadvantages of a voting system is a quintessentially legislative function and courts should not second-guess this sort of policy choice.

D. Ballot Measure 2 does not violate Article III, §§ 3 and 8 of the Alaska Constitution.

Kohlhaas claims that the "election system implemented by Proposition 2 violates [§§ 3 and 8] of Article III of the Constitution of the State of Alaska and is void as it applies to the election of the governor and lieutenant governor."[147] Article III, § 3 of the Alaska Constitution provides that "[t]he governor shall be chosen by the qualified voter of the State at a general election. The candidate receiving the greatest number of votes

---

144 *Dudum*, 640 F.3d at 1103.

145 Second Amended Compl. at ¶ 19. This allegation appears to rest solely on an editorial in the *Anchorage Daily News* speculating that rural, native voters will have more trouble understanding ranked-choice voting than other voters in order to persuade readers to vote against the initiative. But Kohlhaas can offer no evidence to confirm this speculation because no election has yet been held using ranked-choice voting.

146 *Dudum*, 640 F.3d at 1116 (citing *Storer v. Brown*, 415 U.S. 724, 732 (1974) (noting a state interest in "assur[ing] that the winner is the choice of a majority, or at least a strong plurality, of those voting.")). *See also*, *McSweeney*, 665 N.E.2d at 15 (noting that "a preferential scheme…seeks more accurately to reflect voter sentiment.")

147 Second Amended Compl. at ¶ 24.

ATTORNEY GENERAL, STATE OF ALASKA
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907) 269-5100

shall be governor." And Article III, § 8 provides that candidates for governor and lieutenant governor should run jointly as a single ticket in the general election and that "[t]he candidate whose name appears on the ballot jointly with that of the successful candidate for governor shall be elected lieutenant governor."[148]

Kohlhaas appears to be claiming that Ballot Measure 2 is inconsistent with the constitutional directive that the candidate for governor—and by extension for lieutenant governor—who wins the "greatest number of votes" shall be elected. But ranked-choice voting does not produce winning candidates who have not received the "greatest number of votes." To the contrary, the winner is either the "candidate [who] is highest-ranked on more than one-half of the active ballots" after the first round of tabulation[149]—in other words, a majority, which is by definition "the greatest number"—or, "if two or fewer continuing candidates remain, the candidate with the greatest number of votes."[150]

Presumably, Kohlhaas's objection is that a candidate might receive more first-choice rankings than any other candidate, but be defeated by another candidate after the tabulation is complete. But as explained above, under the ranked-choice voting system a

---

[148] Article III, § 8 provides in full: "The lieutenant governor shall be nominated in the manner provided by law for nominating candidates for other elective offices. In the general election the votes cast for a candidate for governor shall be considered as cast also for the candidate for lieutenant governor running jointly with him. The candidate whose name appears on the ballot jointly with that of the successful candidate for governor shall be elected lieutenant governor."

[149] *See* AS 15.15.350(d).

[150] *See* AS 15.15.350(d)(1).

ATTORNEY GENERAL, STATE OF ALASKA
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907) 269-5100

"vote" consists of the voter's *ranking of all the candidates*, not just the voter's first choice. So until all the rankings have been tabulated, the "votes" have not been counted, and there can be no candidate with "the greatest number of votes."

The Alaska Constitution does not prescribe the use of a particular voting system, instead expressly delegating that responsibility to the legislature or the people through the initiative process: Article V, § 3 provides that "*[m]ethods of voting*, including absentee voting, shall *be prescribed by law*." [Emphasis added] It is, therefore, plainly within the scope of the initiative power to adopt a new system of voting, like ranked-choice voting, and ranked-choice voting is not inconsistent with the command of Article III, §§ 3 or 8.

E. Ballot Measure 2's severability clause was not invalidated by the Alaska Supreme Court's single-subject ruling.

Citing *Meyer v. Alaskans for Better Elections*,[151] Kohlhaas also argues that because voters "were forced to adopt or reject [the initiative] as a single entity..., its provisions are not separable, notwithstanding" the initiative's severability clause.[152] This is not the law. To the contrary, just as the Alaska Supreme Court applies the same single-subject rule to initiatives as it does to the bills passed by the legislature,[153] it also applies the same severability test to post-enactment initiatives as it does to legislatively-

---

151 465 P.3d 477 (Alaska 2020)

152 Second Amended Compl. at ¶ 20.

153 *Alaskans for Better Elections*, 465 P.3d at 497.

ATTORNEY GENERAL, STATE OF ALASKA
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907) 269-5100

enacted statutes.[154] And under this test, each of Ballot Measure 2's three reforms is severable from the others. If Kohlhaas was correct that a bill that complies with the single-subject rule could not be severed in any way, then no bill could contain provisions that could be severed.

The Alaska Supreme Court has expressly held that the same test for severability applies to any "enacted measure," whether it was adopted by the legislature or the people through an initiative.[155] The test "asks (1) whether 'legal effect can be given' to the severed statute and (2) if 'the legislature intended the provision to stand' in the event other provisions were struck down."[156]

Kohlhaas does not argue that legal effect cannot be given to any one of Ballot Measure 2's reforms if one of the others is found to be unconstitutional. Instead, he suggests simply that the Alaska Supreme Court's ruling in *Alaskans for Better Elections*—that the initiative did not violate the single subject rule—means that its provisions are "not separable."[157]

But the single-subject rule applies to all legislation, and the Alaska Supreme Court has frequently severed unconstitutional provisions and allowed the rest of a

---

154 *Kritz*, 170 P.3d at 210 ("We conclude there is no compelling reason to apply a different severability analysis to statutes enacted by the people from those enacted by the legislature.")

155 *Id.*

156 *Id.* (quoting *Lynden Transp., Inc. v. State*, 532 P.2d 700, 713 (Alaska 1975)).

157 Second Amended Compl. at ¶ 20.

ATTORNEY GENERAL, STATE OF ALASKA
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907) 269-5100

statute to go into effect.[158] It has also severed part of an initiative—after enactment—and allowed the remainder to go into effect, contrary to Kohlhaas's theory.[159]

Even if Kohlhaas's claim survived the first hurdle of the severability test, it cannot survive the second because he has not even alleged that the voters did not intend the individual reforms to stand, even if one or two were invalidated.[160] The complaint speculates—but does not allege facts in support[161]—that if the reforms had been split apart and voted on separately, they might not all have passed. But that is not the relevant question. As the Alaska Supreme Court has explained, to meet the second prong of the severability test, in a post-enactment challenge to an initiative that includes a severability clause, "the burden is on the challengers to show that the voters *did not intend the remaining provisions to be given effect.*"[162]

Because the complaint argues that both the nonpartisan primary and ranked choice voting are unconstitutional, it appears that the severability argument is directed at the remaining reform requiring disclosure of the sources of "dark money." But this is

---

158 *See e.g.*, *Lynden Transport*, 532 P.2d at 715; *Sonneman v. Hickel*, 836 P.2d 936, 941 (Alaska 1992); *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 634-35 (Alaska 1999); see *also*, *Southeast Alaska Conservation Council v. State*, 202 P.3d 1162, 1176 (Alaska 2009) (holding one part of act severable and another not severable from unconstitutional provision).

159 *See e.g.*, *Kritz*, 170 P.3d 183.

160 Second Amended Compl. at ¶ 20.

161 *Id.* Although the complaint asserts that "most people *would have supported* additional 'dark money' disclosure, while many *would oppose* either one or both the 4 winner primary or ranked choice voting," it does not allege any factual basis for this speculation.

162 *Kritz*, 170 P.3d at 211.

ATTORNEY GENERAL, STATE OF ALASKA
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907) 269-5100

the one reform that the complaint appears to believe would have been supported by a majority of voters if presented individually,[163] thus directly undermining any argument that the voters would not have intended that reform to go into effect if the others were stricken.

In sum, Kohlhaas's severability argument puts the cart before the horse by asserting that the reforms of Ballot Measure 2 are not severable before he has established that any one of those reforms is constitutionally infirm. And even more importantly, he has not even attempted to meet his burden under the Alaska Supreme Court's severability test. The Court should grant the defendants summary judgment on the severability claim, ruling as a matter of law, that Ballot Measure 2's severability clause was not invalidated by *State v. Alaskans for Better Elections*.

V. Conclusion

For these reasons, the Court should reject all of Kohlhaas's claims and grant summary judgment to the State.

DATED April 2, 2021.

TREG R. TAYLOR
ATTORNEY GENERAL

By: */s/ Margaret Paton Walsh*
Margaret Paton Walsh
Alaska Bar No. 0411074
Thomas Flynn
Alaska Bar No. 1910085
Assistant Attorneys General

ATTORNEY GENERAL, STATE OF ALASKA
1031 WEST 4TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE (907) 269-5100

---

[163] Second Amended Compl. at ¶ 20.